IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9168 of 1994

with

SPECIAL CIVIL APPLICATION Nos. 5371 of 1996
TO
SPECIAL CIVIL APPLN NO. 5398 OF 1996 & CA No.2833/94

For Approval and Signature:

HON'BLE MR.JUSTICE M.R.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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SARANGNAGAR COOP.HOUSINHG SOC.LTD

Versus

ADMINISTRATOR,SURAT MUNICIPAL CORPORATION & ORS

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Appearance:

1. Special Civil Application No. 9168 of 1994
MR RR MARSHALL for Petitioners.
MR PRASHANT G DESAI for Respondent No. 1
MR A.D. OZA, GOVT. PLEADER for Resp.No.2 in SCA Nos. 9168/94 & in SCA Nos. 5371 of 1996 to 5379 of 1996.
MR KT DAVE, ASSTT. GOVT. PLEADER in SCA Nos. 5380 of 1996 to 5389 of 1996.
MR K.R. PUJARI, ASSTT. GOVT. PLEADER in SCA Nos. 5390 of 1996 to 5398 of 1996.

MR PAHWA, LD. ADVOCATE for Resp.3

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CORAM : HON'BLE MR.JUSTICE M.R.SHAH

Date of decision: 08/04/2004

ORAL JUDGEMENT

The petitioners - Sarangnagar Co-operative Housing Society Limited, through its President and also the members and residents of the said Society had preferred these petitions under Article 226 of the Constitution of India for an appropriate writ, direction or order, directing the respondent Corporation to cancel the permission granted for construction on the common open plot of the society. They also prayed for directing the respondent No.1 Municipal Corporation to consider the representation of the petitioner society and to take immediate action to see that illegal construction is removed and obstruction to the main entrance of the society is also removed. By way amendment, the petitioners had also challenged the order passed by the State Government i.e. Competent authority and Additional Collector dated 21st November, 1988, in cancelling permission granted under Section 21(1) of ULC Act.

2 When the Special Civil Application No. 9168 of 1994 was admitted, this Court granted interim relief in terms of paragraph 9(c) i.e. restraining the respondent No.3 from making any further construction on the common open plot of the society, and respondent No.1 Municipal Corporation was directed to see that respondent No.3 makes no further construction. The ad-interim relief is in operation till date, meaning thereby that the respondent No.3 is restrained from putting up any further construction in the common plot.

3. Few facts necessary for determination of these Special Civil Applications are given under.

4. The scheme under Section 21 of the Urban Land Ceiling Act was sanctioned for the construction of residential bungalows the members of the petitioner No.1 Co-operative Society. That was sanctioned in the year 1980. That after the sanctioning of the scheme under Section 21 of the Act, plans were submitted for the purpose of putting up the construction with the respondent No.1 Municipal Corporation and in the year 1980 itself, the Municipal Corporation sanctioned the plan for putting up the construction in consonance with

the scheme under Section 21 of the Act. In that scheme, there was a provision for having a common plot. The members started putting up the construction and in all it seems that 57 members have put up the construction.

5. As the respondent No.3 was trying to put up the construction in common plot, the petitioner No.1 filed a Regular Civil Suit No. 1414 of 1989 in the Court of learned Fifth Joint Civil Judge (SD), Surat. That suit was filed against respondent No.3 for restraining him from putting up any construction on the common plot and further restraining him from causing any obstruction of the enjoyment of the said land by the members of the society. That in the said suit, the petitioners had also filed an application below Ex.5, which came to be partly allowed by the learned Fifth Joint Civil Judge (SD), Surat, by his order dated 9.2.1990, by which the respondent No.3 was restrained from raising the construction over the common open plot without following due procedure of law i.e. without taking a previous sanction of the Surat Municipal Corporation. It is the case of the petitioners that thereafter Municipal Corporation issued a notice directing the respondent No.3 to remove the construction which was made over the common plot. That against the said action/notice by which Municipal Corporation directed the respondent No.3 to remove the construction which was made over the common plot, the respondent No.3 had filed a Regular Civil Suit No. 1085 of 1990, under which he has also prayed for an interim relief below Ex.5 for restraining the Municipal Corporation from demolishing the construction which is made over in the common plot, and the learned Second Joint Civil Judge (SD), Surat, by his order dated 30.11.1991 had rejected the said application.

6. It is the case of the petitioners that inspite of the rejection of the application below Ex.5 in Regular Civil Suit No. 1085 of 1990 and insptie of the show cause notice being issued by the Municipal Corporation, the construction which was there in the common plot was not removed by the Municipal Corporation and therefore, they have preferred the present Special Civil Applications.

7. In the meantime, the petitioners also came to know with regard to the cancellation of the scheme under Section 21 of the Act by the Competent authority and Additional Collector, Surat, vide order dated 21.12.1988 and therefore, by way of amendment, the petitioners have also challenged the cancellation of the scheme under Section 21(1) of the Act.

8. There are certain developments which have taken place during the pendency of the petitions which are as under.

9. After 1980 plans were sanctioned and the development permission was granted by the Surat Municipal Corporation in the year 1980 on the basis of the scheme under Section 21 of the Act, revised plans were submitted by the respondent No.3 in the year 1994 and the revised plans were sanctioned on 4.5.1994 by the Surat Municipal Corporation, meaning thereby that by sanction of the revised plans on 4.5.1994, the plans which were sanctioned in the year 1980 and the development permission, which was granted in 1980 will not have any effect and will not be in operation. It seems that while sanctioning the plan on 4.5.1994, some area with regard to COMMON OPEN PLOT came to be reduced.

10. That by exercising the powers under Section 258 of the Bombay Provincial Municipal Corporation Act, the revised plans which were sanctioned on 4.5.1994, and the development permission which was granted in the year 1994 came to be cancelled by the Municipal Corporation, by order dated 19.2.1998. It is pertinent to note that so far as the order dated 18.2.1998 passed by the Municipal Corporation is concerned, by which the revised plans which were sanctioned on 4.5.1994 came to be cancelled, so also the development permission which was granted in 1994 came to be cancelled, the same is not challenged either by the petitioners or by the respondent No.3 and the said order has become final. Mr. P.G. Desai, learned Advocate appearing on behalf of the respondent No.1 Surat Municipal Corporation has submitted that on 24.10.2000, the petitioners as well as the respondent No.3 were called upon to submit revised plans, but till date the revised plans are not submitted either by the petitioners and/or by the respondent No.3. So the resultant effect is that as on date, neither the plans which were sanctioned in 1980, nor the plans which were sanction in the year 1994, and/or the development permissions which were granted in 1980 and/or the development permission granted in the year 1994 are in existence. So the prayer of the petitioners for cancellation of the permission granted by the Municipal Corporation for construction in the year 1994 is concerned, the same may not survive as the said grievance will not survive now.

11. In the present Special Civil Application, a Civil Application has been filed by the respondent No.3, being

Civil Application No. 2833 of 1994, in which the respondent No.3 stated as under:-

"The applicant states and submits that the common open plot in question is even as on date kept undisturbed and no construction is put up thereon either by the present applicant, or by any other member of the said society"

12. He has also further stated that in fact, the new scheme under Section 20 of the Act, has come into force from 6.2.1990 and as per the new scheme, the common plot is kept in tact and there is no intention on the part of the applicant to put up any construction thereon and there is no basis for any apprehension as the said common plot will be kept as it is by the applicant. It is pertinent to note that so far as the order under Section 20 of the Urban Land Ceiling Act is concerned, there is no question of submitting any scheme. By granting the permission under Section 20 of the Act, a person is entitled to retain the land which is required to be declared as excess vacant land. Be that, a categorical statement is made by the applicant in the aforesaid Civil Application that the common plot is kept open and that he does not propose to put up any construction except the construction which is already put up by him, which was sanctioned in the year 1980.

13. From the facts which are stated hereinabove, at present the plan which was sanctioned in year 1980 is not in existence and the same has been cancelled, in the sense that on sanctioning the revised plan in the year 1994, the 1980 development permission and the plan which was sanctioned in the year 1980 will not survive. Even the revised plan which was sanctioned on 4.5.1994 and the development permission which was granted in the year 1994 is also not in existence as the same has been cancelled by the respondent No.1 on 18.2.1998, exercising the powers under Section 258 of the Bombay Provincial Municipal Corporation Act, which has become final and that has not been challenged. So, in view of the aforesaid facts and in view of the fact that even till date the revised plans are not submitted, though demanded by the Municipal Corporation vide communication dated 24.10.2000, the construction which is existing in common plot is required to be removed and/or demolished by the respondent Municipal Corporation and even otherwise the COMMON OPEN PLOT is concerned the same is of the ownership of all the members of the society and it cannot be said to be of ownership of any individual and/or respondent No.3 who is simply a developer and the COMMON

OPEN PLOT is required to be kept open for the benefit and use of all the members of the society. The Respondent No.3 cannot claim any ownership and/or cannot have any right over the COMMON OPEN PLOT to make any construction for his own benefit and use and therefore, the respondent Municipal Corporation is hereby directed to take steps for removal of the construction which is there on the common plot.

14. At this stage Shri Pahwa, learned Advocate appearing on behalf of the respondent No.3 has submitted that his client has already submitted an application on 18.1.2002, which is placed on record and he has submitted that he has already moved an application before the respondent No.1 pursuant to the communication dated 24.10.2000. Shri Desai, learned Advocate appearing on behalf of the Municipal Corporation submits that in the said application dated 18.1.2002, what is prayed for is to renew the plan which was sanctioned on 4.5.1994, which was subsequently cancelled by order dated 18.2.1998. According to him, making an application for renewal is different from that of submitting the revised plan. The plan which was already cancelled cannot be renewed. The only thing which was required to be done was to submit the revised plan and the petitioners as well as the respondent No.3 has failed to submit any revised plan.

15. It is also further submitted by Shri Pahwa that under the 1980 plan, approximately 1800 sq.mtrs of land was to be kept as common open plot and according to him, the construction upto 15% of that land was permissible on the common open plot for which the permission was granted by the Corporation and as per the 1994 plan, the plot of approximately 1000 sq.mtrs of land was required to be kept as common open plot and this much area of lands was also kept open by the respondent No.3. Therefore, he requested not to pass any order with regard to removal of the construction which is already there, by submitting that the construction which is already put up by the respondent No.3 cannot be said to be a common open plot. Such an argument is absolutely misconceived. Even if the permission is granted by the Municipal Corporation for putting up the construction in the common open plot, then also the existence of common open plot will not go away. Still the said land upon which the construction was permitted continues to be the common open plot. As stated hereinabove, the COMMON OPEN PLOT is of the ownership of all the members of the Society, any individual member, more particularly the respondent No.3 who was only an organiser of the society cannot claim any riht over the COMMON OPEN PLOT in his individual

capacity. As stated above, even otherwise in view of the fact that the plans which were sanctioned in the year 1980 and which were sanctioned in the year 1994 are not in existence as on today and under the circumstances the construction which is there on the common plot is absolutely illegal, and under the circumstances an order is required to be passed directing the respondent No.1 to take immediate steps to see that construction which is existing on the common plot is demolished/removed, by holding that the respondent No.1 has failed in its duty to remove the construction which is not legal and in accordance with plan.

16. That brings me to the question with regard to the challenge by the petitioners of the orders passed by the competent authority, by which the permission under Section 21(1) of the Urban Land Ceiling Act was cancelled. It is an admitted position that the possession of the land in question is with the society and the members and the possession of the land in question has not been taken over by the State Government. The learned Asstt. Government Pleaders also do not dispute the same i.e. possession with the petitioners. In this view of the matter, when the possession is with the petitioners and the possession has not been taken over by the State Government, in view of the repeal of Urban Land Ceiling Act, and in view of Section 4 of the Urban Land Ceiling and Regulation Repeal Act, 1999, the proceedings are required to be abetted. Thus, in view of the provisions of Section 4 of the repeal Act, the proceedings are required to be abetted. Hence, the present Special Civil Application and the order passed by the competent authority to that extent are abetted. For the foregoing reasons, the petition succeeds. The respondent No.1 is directed to take steps to remove the construction which is there on the common open plot of the petitioner No.1 Society, after following due procedure of law. Rule is made absolute accordingly.

17. At this stage Shri Pahwa, learned Advocate appearing for the respondent No.3 requests to stay this order for a period of 4 weeks. However, Shri P.G. Desai, learned Advocate appearing on behalf of Surat Municipal Corporation makes a statement on instruction from his client that they will not take any action till 8th May, 2004. At this stage, Shri Pahwa learned Advocate appearing on behalf of the respondent No.3 also requests the Court to make suitable observation with regard to approaching the Municipal Corporation by his client. It will be open for the respondent No.2 to take recourse to law if it is permissible under the law. Rule

is made absolute in each matter, with no order as to costs.

18. In view of the order passed in the main matter, there shall be no order on the Civil Application, which stands disposed of accordingly.

(M.R. Shah, J.)
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